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IN THE

Supreme Court of the United States

October Term, 1944.

No. 1079

GREAT LAKES TRANSIT CORPORATION,
Defendant-Petitioner,

against

ALFRED G. MARCEAU,
Plaintiff-Respondent.

BRIEF OPPOSING PETITION FOR WRIT OF CERTIORARI.

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BRIEF OPPOSING PETITION FOR WRIT OF CERTIORARI.

Statement and Facts.

Respondent was employed by petitioner as a second cook or assistant steward aboard its vessel "ALFRED H. SMITH," being loaded at a dock in Buffalo Harbor, owned by the New York Central Railroad Co., but leased to, and operated by, petitioner. On November 8, 1940, shortly before midnight he was returning to the vessel to take care of the night lunch at the direction of the steward *(Record*, pp. 51-52), when the accident in question occurred.

The dock slopes sharply down to the edge of the water and the ship's ladder rested on or against this slope (pp.

60-62). During the course of the loading, meal or flour had been spilled on the dock around the bottom of the ladder and the area covered by the meal or flour had become slippery due to a rain earlier in the evening. Someone had thrown sawdust or shavings over the area (pp. 54-55). There were no lights in the vicinity (p. 55), and respondent, in going down the incline to the ladder, slipped on the area covered by the meal and fell, striking his groin on the upright of the ladder and his back on a dock cleat (p. 54).

Following the decisions, which at that time refused to apply the Jones Act to injuries to seamen occurring on land and applied the local law of the jurisdiction where the accident occurred, respondent, in the Spring of 1941, filed a claim for compensation with the New York State Workmen's Compensation Bureau, which finally resulted in an award in his favor, and an affirmance thereof by the Industrial Board on the 28th day of February, 1942. Petitioner appealed to the New York Supreme Court, Appellate Division, Third Department, claiming a lack of jurisdiction, but the record has not been filed and the appeal has never been brought on for argument. The award has never been paid, nor has the respondent received from any source anything to compensate his loss.

The present action would have been barred by the Statute of Limitations on November 8, 1943, and relying on the principle of *O'Donnell v. Great Lakes Co.*, 318 U. S. 36, Marceau commenced this action in September, 1943, under the Jones Act, 41 Stat. 1007, 46 U. S. C. sec. 688.

The trial resulted in a verdict of the jury in favor of respondent in the sum of Four thousand, five hundred Dollars ($4,500.00); from the judgment entered thereon peti-

tioner appealed to the Court of Appeals for the Second Circuit, which unanimously affirmed. The opinion is not contained in the record and has not yet been reported.

Circuit Judge Augustus N. Hand set out the facts quite fully and found there was ample evidence to support the jury's finding that petitioner was negligent in causing or permitting the condition at the foot of the ladder and in failing to provide proper lights.

Judge Hand said: "The award for workmen's compensation is on appeal and it does not appear that any payments on account of it were made"; that since the District Court acquired jurisdiction of the action under the Jones Act, "there is no basis for invoking any doctrine of election of remedies and nothing has occurred in the way of an accord and satisfaction"; that "the plaintiff was acting under orders when he returned to the ship" and consequently "was not only acting in the course of his employment but suffered his injuries while on property in the possession and under the control of the defendant as lessee, over which the plaintiff had to pass in order to return to his work."

Judge Hand further said, concerning petitioner's claim that the Jones Act was applicable to injuries to seamen on land only when suffered subsequent to the decision of this Court in the *O'Donnell* case, *supra:*

> "The contention is based on the unsound notion that the decision, if it gave a new interpretation as to the extent of the remedies available to seamen under the Jones Act, was in effect like a statutory amendment of the Act. But the action is in tort, there was no abridgement by judicial decision of the contract rights of the parties even if an alteration of their rights by reason of such a decision would be forbidden. We

know of no precedent for holding that a failure to adhere to a former judicial limitation of claims to recover damages for negligence is an unlawful impairment of existing rights. The decision of the Supreme Court in *O'Donnell v. Great Lakes*, 318 U. S. 36, must be regarded as no more than a declaration of what was the law from the date the Jones Act took effect."

Petitioner now seeks a writ of certiorari.

ARGUMENT.

POINT I.

The compensation award, wholly unpaid, does not bar this action under the Jones Act; and there was no election of remedies.

An award of compensation has been made by the New York State Industrial Board, but respondent has received nothing under it; he has never received from any source anything to compensate him for his injuries; no money has ever been paid to him either under the award or otherwise.

The award of compensation was a nullity; it bound no one; it was a void determination and can be set aside or disregarded by either the vessel owner or the seaman.

Matter of Doey v. Howland Co., 224 N. Y. 30, 39.

If the award had been paid in full, then there would have been a common-law accord and satisfaction; and consequently acceptance of such payment would have destroyed respondent's right of action.

Brassel v. Electric Welding Co., 239 N. Y. 78, 80.

Even a partial payment of the award would not have amounted to a satisfaction of respondent's claim and would not have destroyed his right of action.

Larsey v. Hogan & Sons, 239 N. Y. 298, 302.

There can be no election of the remedies unless two or more remedies exist.

Bierce v. Hutchins, 205 U. S. 340, 347.
Schenck v. State Line, 238 N. Y. 308.

Here there is but one remedy. If the Industrial Board has jurisdiction, then and only then does the exclusive liability prescribed in Sec. 11 of the Compensation law apply. If, on the other hand, the District Court has jurisdiction, the Jones Act applies.

POINT II.

The effect of the decision in the O'Donnell case.

In *O'Donnell v. Great Lakes Co., supra*, this Court held that a seaman injured on shore while in the service of his vessel, was entitled to recover for his injuries in a suit brought against his employer under the Jones Act, and that Congress had constitutional authority to provide such a remedy for seamen.

The decisions of four different Circuit Courts of Appeals, cited at page 4 of petitioner's brief, must, therefore, be regarded as erroneous, and no constitutional rights can be based on the error of prior decisions.

Dunbar v. City of New York, 251 U. S. 516, 519.

In other words, a litigant who has trusted to the erroneous judgment of an inferior tribunal is not entitled to be helped out by the courts.

Evans v. Supreme Council, Royal Arcanum, 223 N. Y. 497, 503.

Cardozo, The Nature of The Judicial Process, pp. 147, 148.

If it should be assumed, contrary to the fact, that by its decision in the *O'Donnell* case this Court had overruled a former decision to the contrary effect, nevertheless the *O'Donnell* decision would be retrospective in its operation, and the effect would be not that the former decision was bad, but that it never was the law, and that the Jones Act covers, and always did cover, injuries to seamen sustained on land in the course of their employment.

People ex rel. Rice v. Graves, 242 App. Div. 128, 131, 133; affd. without opinion, 270 N. Y. 498; cert. denied, 298 U. S. 683.

Jackson v. Harris, 43 Fed. 2d 513, 516.

Ruppert v. Ruppert, 134 Fed. 2d 497, 500.

Chase v. American Cartage Co., 176 Wisc. 235.

However, we are not concerned with the effect of a decision which "overrules" an earlier decision of this Court. The question of law presented in the *O'Donnell* case had not previously been presented to this Court, which, in effect, disapproved as erroneous the decisions of the Circuit Courts of Appeals cited by petitioner. The construction given to the Jones Act in those decisions was, as the *O'Donnell* case held, incorrect as the Act existed when the decisions were rendered. In rejecting the principle underlying those decisions this Court was not disregarding the principle of *stare decisis*, it was attempting to settle a question

of law which until then had not been determined by the final tribunal of the United States.

Sears, Roebuck & Co. v. 9 Ave.—31 St. Corp., 274 N. Y. 388, 401.

POINT III.

Respondent was injured in the course of his Employment.

Respondent, at the time of his injury, was returning to his vessel to prepare the midnight lunch at the direction of the steward; for such purpose he was crossing the dock of petitioner, his employer, and had arrived within a few feet of the foot of the vessel's ladder (pp. 50-55). He, therefore, "suffered personal injury in the course of his employment" within the meaning of the Jones Act.

It is a general rule that, if an employee is injured on the premises of his employer in going with reasonable dispatch and method to or from actual performance of the specific duties of the employment by a way provided by the employer or reasonably used by the employee, such injury is suffered in the course of his employment; that the going to and from the actual work and the risk involved in it are reasonably incident to the employment.

Erie R. R. Co. v. Winfield, 244 U. S. 170, 173.
Cudahy Co. v. Parramore, 263 U. S. 418, 426.
Matter of Lynch v. City of New York, 242 N. Y. 115, 118.

In a compensation case the deceased, employed as a longshoreman, was ordered to report to work at seven p. m. to scoop grain on a steamship tied up to the dock of a grain

elevator in Buffalo harbor. About fifteen minutes after seven a co-employee missed the deceased, and, after a search, his scoop was found on the dock opposite the stern of the boat and later on his body was found floating under the dock. The Industrial Board found that the deceased, while working for his employer, fell into the water and was drowned; and that the injury resulting in his death was an accidental injury arising out of and in the course of his employment. The award was affirmed.

Matter of Commissioner of Taxation, etc. v. Grain Handling Corp., 272 N. Y. 548.

The Federal Employers' Liability Act (35 Stat. 65; 53 Stat. 1404; 45 U. S. C. secs. 51-60), which has been made applicable to seamen by the Jones Act, provides in section 1 that "every common carrier by railroad while engaging" in interstate commerce "shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce * * * resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its * * * boats, *wharves*, or other equipment." (Italics supplied.)

This means that the vessel owner must provide for his seamen a safe wharf for passing to and from the vessel.

This Court, in a recent case, has summed up the situation here presented as follows:

> "The assumption is hardly sound that the normal uses and purposes of shore leave are 'exclusively personal' and have no relation to the vessel's business. Men cannot live for long cooped up aboard ship, without substantial impairment of their efficiency, if not also serious danger to discipline. Relaxation beyond the con-

fines of the ship is necessary if the work is to go on, more so that it may move smoothly. No master would take a crew to sea if he could not grant shore leave, and no crew would be taken if it could never obtain it. Even more for the seaman than for the landsman, therefore, 'the superfluous is the necessary * * * to make life livable' and to get work done. In short, shore leave is an elemental necessity in the sailing of ships, a part of the business as old as the art, not merely a personal diversion."

Aguilar v. Standard Oil Co., 318 U. S. 724, 733.

POINT IV.

The petition should be denied.

It is respectfully submitted that the petition for a writ of certiorari should be denied.

THOMAS C. BURKE,
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